

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEANETTE A. DOCKTER,

Appellant.

No. 37751-9-II

UNPUBLISHED OPINION

Houghton, J. — Jeanette Dockter appeals her conviction for second degree theft, arguing that the trial court erred in holding a bench trial because she did not waive her right to a trial by jury.¹ We reverse and remand for new trial.

FACTS

On January 18, 2008, the State charged Dockter with second degree theft. The trial court issued a notice of trial date setting, listing the case as a jury trial. On April 14, Dockter signed a waiver of trial by a jury of 12, instead agreeing to a jury of 6. Her attorney also signed the waiver certifying that Dockter agreed to it knowingly, voluntarily, and intelligently. And the trial court also signed the same waiver. A colloquy as to the waiver ensued:

[Defense counsel]: I'm handing forward a waiver of jury.

[Prosecutor]: I don't think there are any issues other than this case might be continued, because it's not a jury trial, to Wednesday or Thursday.

THE COURT: All right.

¹ Dockter also assigns error to the trial court's evidentiary rulings. Because we reverse and remand, we do not address it further except as noted in footnote 3.

[Prosecutor]: I think the defendant needs to be told to call the attorney on Monday.

THE COURT: Right. You should keep in contact with your attorney because if there's a log jam of jury trials, we may move that a day or two. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Ms. Dockter, do you read and write well?

THE DEFENDANT: Yes.

THE COURT: Did you carefully read this waiver of trial by jury.

THE DEFENDANT: Yes, I did.

THE COURT: Did you discuss it with your attorney?

THE DEFENDANT: I did.

THE COURT: Do you understand it?

THE DEFENDANT: Yes.

THE COURT: Do you clearly understand you have a right to a jury trial where 12 citizens will determine your guilt or innocence?

THE DEFENDANT: Yes.

THE COURT: That's guaranteed by both the U.S. and Washington state constitutions?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that with the 12 jurors, 12 have to be convinced beyond a reasonable doubt to convict you?

THE DEFENDANT: Yes, I do.

THE COURT: You understand with a bench trial, the prosecution just has to convince the judge beyond a reasonable doubt of your guilt or innocence.

THE DEFENDANT: Yes.

THE COURT: And you did sign that after you carefully read it and understood it.

THE DEFENDANT: I did.

THE COURT: I will accept your waiver. . . .

Report of Proceedings (RP) (Apr. 14, 2008) at 2-4.

On May 7, Dockter's bench trial commenced before a different judge. During the trial, the State presented evidence that in November 2007, Doug Streeter, chief financial officer for Grays Harbor Public Utilities District (PUD), discovered that Dockter, a PUD employee, had taken \$200 from her cash register for no apparent reason. When Streeter confronted Dockter, she admitted to taking the money and resigned. The State presented further evidence of Dockter

unlawfully taking other funds.

The trial court found Dockter guilty of second degree theft.² She appeals.

ANALYSIS

Dockter contends that she did not waive her right to a jury trial when she signed her waiver of a 12-person jury and agreed to a 6-person jury. She asserts that the trial court's colloquy did not demonstrate that she knowingly, voluntarily, and intelligently waived her right. She argues that the trial court erred in proceeding to a bench trial. We agree.

Criminal defendants have a constitutionally protected right to a jury trial. U.S. Const. amend. VI; Const. art. I, § 21. A defendant may knowingly, voluntarily, and intelligently waive this right. *State v. Forza*, 70 Wn.2d 69, 71, 422 P.2d 475 (1966). A defendant may raise the issue of the absence of a valid waiver for the first time on appeal. *See, e.g., State v. Stegall*, 124 Wn.2d 719, 725-26, 881 P.2d 979 (1994). We review waiver of the right to a jury trial de novo. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

A defendant may waive the right to a jury trial in writing or orally on the record. *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979). The record must contain either a statement by the defendant expressly agreeing to the waiver or an indication that the trial court or defense counsel discussed it with the defendant prior to defense counsel's waiver. *Stegall*, 124 Wn.2d at 729. Silence does not suffice as evidence of a waiver, even where defendant is represented by counsel and counsel waives a jury trial. *Stegall*, 124 Wn.2d at 730. The record must contain an affirmative, unequivocal waiver by the defendant. *City of Bellevue v. Acrey*, 103 Wn.2d 203,

² The trial court issued findings of fact in support of its verdict. The trial court also found Streeter's testimony "credible as to every material detail." RP (May 7, 2008) at 69.

207, 691 P.2d 957 (1984). A waiver's validity depends on the circumstances of the case, including the defendant's experience and capabilities. *Stegall*, 124 Wn.2d at 725.

The State bears the burden of proving the defendant waived the right to a jury trial. *Stegall*, 124 Wn.2d at 730. We indulge every reasonable presumption against waiver absent an adequate record to the contrary. *Stegall*, 124 Wn.2d at 730. If the State fails to meet its burden, we will reverse the conviction and remand for a new trial. *Acrey*, 103 Wn.2d at 212.

Here, Dockter waived her right to trial by a jury of 12 in favor of trial by a jury of 6. But the record contains no convincing evidence she consented to a bench trial. Her written waiver does not mention a bench trial. When the trial court engaged in a colloquy with her, nearly every question related to whether she read and understood the written waiver. Regarding a bench trial, the trial court never asked her whether she agreed to a bench trial, only whether she understood what a bench trial was. Although some comments made by the trial court and defense counsel suggest an expectation that the case would proceed as a bench trial, Dockter's silence during these spontaneous comments between counsel and the trial court cannot support a finding that she affirmatively waived her right to a jury trial. *See Stegall*, 124 Wn.2d at 730-31; *City of Seattle v. Crumrine*, 98 Wn.2d 62, 65, 653 P.2d 605 (1982). Moreover, the trial court never asked the ultimate question: whether she understood that she was agreeing to waive her right to a 12-person jury trial and to having a trial by the judge alone.

Given that we indulge every reasonable presumption against waiver, the State has not carried its burden of showing that Dockter waived her right to a jury trial. *See Stegall*, 124 Wn.2d at 730. Accordingly, we vacate her conviction for second degree theft and remand for

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new trial. *See Acrey*, 103 Wn.2d at 212; *Wicke*, 91 Wn.2d at 645.

Reversed and remanded for a new trial.³

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

We concur:

Penoyar A.C.J.

Leach, J.

³ As noted, Dockter also raises evidentiary error. She argues that the trial court should not have admitted the screenshots from the PUD customer information system showing information from two other customer accounts. But Streeter testified that the screenshots constituted business records, and Dockter did not object to this testimony as lacking adequate foundation. *See State v. Hopkins*, 134 Wn. App. 780, 789, 142 P.3d 1104 (2006). Thus, we decline to review this claim of error. RAP 2.5(a). Likewise, we do not address Dockter's argument about admitting a post-it note, as she did not properly object to it as hearsay at trial. RAP 2.5(a).